EXHIBIT 10

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Briefs and Other Related Documents

Flanders v. Fortis Ins. Co.W.D.Tex.,2005.Only the Westlaw citation is currently available.

United States District Court,W.D. Texas, San Antonio Division.

Jone Geimer FLANDERS and husband, Christopher Flanders, Plaintiffs,

v.

FORTIS INSURANCE COMPANY and John Alden Insurance Company, et al. Defendants.

No. SA-05-CA-0726-RF.

Nov. 14, 2005.

A. J. Hohman, Jr., Hohman Georges & Gehring, L.L.P., San Antonio, TX, for Plaintiffs.

Thomas F.A.Hetherington, Bracewell & Patterson, LLP, Rick Lee Oldenettel, Oldenettel & Associates, P.C., Houston, TX, for Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO REMAND

FURGESON, J.

***1** Before the Court is Plaintiffs Jone and Christopher Flanders' Motion to Remand, filed August 11, 2005 (Docket No. 4), Defendants' Response to Plaintiff's Motion to Remand, filed August 22, 2005 (Docket No. 5), and Plaintiff's Reply to Defendants' Response, filed September 2, 2005 (Docket No. 7). The Court held a hearing on this matter on November 9, 2005. After due consideration, the Court is of the opinion that the Motion to Remand should be DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

***1** On or about October 1, 2004, Defendant John Alden Insurance Company issued a medical insurance policy to Plaintiff Jone Flanders, and Plaintiffs began paying premiums to Defendants.FN1 On that same day, Plaintiff Jone Flanders underwent a colonoscopy and was diagnosed with colon cancer. Within a few days of the diagnosis Mrs. Flanders began receiving cancer-related treatment. Plaintiffs allege that on or about January 19, 2005, Defendants improperly denied payment of benefits to which they were entitled under the insurance policy. Defendants contend that a routine claims investigation conducted after Plaintiff received her colon cancer diagnosis revealed preexisting conditions that Plaintiff failed to disclose on her application for health benefits. Defendants claim that Plaintiffs' (both of whom are physicians) failure to disclose Mrs. Flanders' prior symptoms such as "rectal bleeding, weight loss, and reduction in stool caliber for up to a year prior to the effective date of her policy," FN2 constituted a preexisting condition and excused their obligation to pay benefits.

FN1. Defendant Fortis Insurance is the administrator and/or plan servicer of the insurance policy issued by Defendant John Alden Insurance Company.

FN2. Def. Response to Pl. Motion to Remand (Docket No. 5) at II.

***1** Plaintiff Jone Flanders and her husband Christopher instituted this suit on June 3, 2005, in the 22nd Judicial District of Comal County, Texas against Defendants John Alden Insurance Company, Fortis Insurance Company, Comaltex Insurance Agency, and Ruby Bading. Ruby Bading was the insurance agent, employed by Defendant Comaltex, who sold Plaintiffs the John Alden medical insurance policy. Defendants John Alden Insurance Company and Fortis Insurance Company filed a Notice of Removal (Docket No. 1) on July 29, 2005, claiming that Defendants Bading and Comaltex were fraudulently joined for the sole purpose of destroying diversity jurisdiction. Plaintiffs then filed this Motion to Remand, insisting all Defendants were properly joined and that complete diversity among the parties does not exist.

DISCUSSION

***1** Plaintiffs contend that Defendants' Notice of Removal is improper because of a lack of diversity of citizenship. Defendants disagree, arguing that Defendants Bading and Comaltex were fraudulently joined and remand is not warranted. The party seeking removal bears the burden of proving that the removal was properly effectuated.FN3 This burden includes demonstrating both that a jurisdictional basis for removal exists and that the parties complied with the requirements of the removal statute.FN4 Further, courts are to construe removal statutes narrowly, with any doubts resolved against removal.FN5

FN3. *Monterey Mushrooms, Inc. v. Hall,* 14 F.Supp.2d 988, 990 (S.D.Tex.1998)(citing Willy v. Coastal Corp., 855 F.2d 1160, 1164 (5th Cir.1988), *appeal after remand,* 915 F.2d 965 (5th Cir.1990), *aff'd* 503 U.S. 131, 112 S.Ct. 1076, 117 L.Ed.2d 280(1972)).

FN4. *Id.*

FN5. *Id.*

*2 Defendants allege that Bading and Comaltex were fraudulently joined for the sole purpose of defeating diversity jurisdiction. The recent *en banc* decision of the Fifth Circuit Court of Appeals in *Smallwood v. Illinois Central Railroad Co.*FN6 guides this Court's determination of whether Bading and Comaltex were improperly joined to defeat diversity jurisdiction. As the Fifth Circuit wrote in *Smallwood,* "The starting point for analyzing claims of improper joinder must be the statutes authorizing removal to federal court of cases filed in state court." FN7 While suits arising under federal law are removable irrespective of the citizenship of the parties, all other suits are removable "only if none of the parties in interest *properly* joined and served as defendants is a citizen of the State in which such action is brought." FN8 If any party in the case has been improperly or collusively joined to manufacture federal diversity jurisdiction, the district court is prohibited from exercising jurisdiction over the suit.FN9 Federal courts should both carefully protect the right to proceed in federal court and allow state courts in proper cases to retain their own jurisdiction. FN10

FN6. 385 F.3d 568 (5th Cir.2004)(*en banc*). The decision of the Fifth Circuit adopts the term "improper joinder" as more accurately characterizing the concept that is frequently referred to as "fraudulent joinder." *Id.* at 571 n. 1.

FN7. *Id.* at 572.

FN8. *Id.* (citing 28 U.S.C. § 1441(b)).

FN9. 28 U.S.C. § 1359.

FN10. 14 Charles Alan Wright *et al.* Federal Practice & Procedure § 3641, at 173 (3d ed.1998).

*2 With these goals in mind, the Fifth Circuit in *Smallwood* recognized two ways to establish improper joinder: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." FN11 As articulated in *Travis v. Irby* and explicitly reaffirmed in *Smallwood,* the test for fraudulent or improper joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant.FN12 Put another way, there is improper joinder if there is no reasonable basis for predicting that the plaintiff might be able to recover against an in-state defendant.FN13 Furthermore, "a 'mere theoretical possibility of recovery under local law' will not preclude a finding of improper joinder." FN14

FN11. 385 F.3d at 573 (quoting *Travis v. Irby,* 326 F.3d 644, 646-47 (5th Cir.2003)).

FN12. *Id.; Travis v. Irby,* 326 F.3d at 648.

FN13. *Smallwood* 385 F.3d at 573. To reduce possible confusion, the Fifth Circuit expressly adopted this phrasing of the required proof and rejected all others, whether they appear to describe the same standard or not. *Id.* n. 9 (quoting *Badon II,* 236 F.3d 282, 286 n. 4 ("A 'mere theoretical possibility of recovery under local law' will not preclude a finding of improper joinder.")).

FN14. *Id.* at n. 9 (quoting Badon v. RJR Nabisco, Inc., 236 F.3d 282, 286 n. 4 (5th Cir.2000)).

*2 In *Smallwood,* the Fifth Circuit also clarified the proper procedures for predicting whether a plaintiff has a reasonable basis of recovery under state law, concluding that courts may resolve the issue in one of two ways.FN15 One method is for the court to conduct "a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant." FN16 For a court to grant a Rule 12(b)(6) dismissal, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." FN17 The other option is for the court to pierce the pleadings and conduct a summary inquiry, an approach appropriate only when a plaintiff has stated a claim but has "misstated or omitted discrete facts that would determine the propriety of joinder." FN18 The choice between these procedures is within the discretion of the trial court, with the favored approach being the former, 12(b)(6)-type analysis.FN19

FN15. *Id.*

FN16. *Id.* (quoting *McKee v. Kansas City S. Ry., Co.*, 358 F.3d 329, 334 (5th Cir.2004)).

FN17. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

FN18. *Smallwood*, 385 F.3d at 573.

FN19. *Id.*

***3** The heavy burden of proving that Bading and Comaltex have been fraudulently joined is on Fortis Insurance Company and John Alden as the removing parties.FN20 If it is determined that there is no possibility of recovery against Bading or Comaltex, the motion to remand will be denied. FN21

FN20. *Travis v. Irby*, 326 F.3d 644, 649 (5th Cir.2003).

FN21. *Id.* at 648.

***3** Plaintiffs' first argument is that Defendants' Notice of Removal is defective because Defendants Comaltex and Bading neither joined in the removal nor consented to it. However, the Fifth Circuit has expressly rejected this argument, stating that to require consent of "improperly or fraudulently joined parties would be nonsensical, as removal in those cases is based on the contention that no other proper defendant exists." FN22 Accordingly, Defendants' Notice of Removal is not fatally defective on this ground.

FN22. *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir.1993); *see also* 77 C.J.S. *Remove* § 150 (2005)("Removal is proper without the consent of a party joined improperly or fraudulently.").

***3** Plaintiffs Complaint alleges four causes of action against Defendants Comaltex and Bading: 1) violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code; 2) breach of duty of good faith and fair dealing; 3) negligence; and 4) civil conspiracy. Plaintiffs point to language from a Fifth Circuit case stating that "if the plaintiff has any possibility of recovery under state law against the party whose joinder is questioned, then the joinder is not fraudulent in fact or law." FN23 However, later Fifth Circuit precedent asserts that "we have never held that a particular plaintiff might possibly establish liability by the mere hypothetical possibility that such an action could exist. To the contrary, whether the plaintiff has stated a valid state law cause of action depends upon and is tied to the factual fit between the plaintiffs' allegations and the pleaded theory of recovery." FN24 While Plaintiffs have accurately quoted the standard as stated in *Burden*, this Court believes *Griggs* to be the more accurate statement of the law regarding fraudulent joinder.

FN23. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 216 (5th Cir.1995).

FN24. *Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir.1999).

***3** Both the Texas Insurance Code and the Texas Deceptive Trade Practices Act permit a private cause of action against any individual who engages in one or more of the prohibited acts or practices.FN25 Texas courts recognize the liability of an insurance sales agent under these statutes when that agent "misrepresents *specific policy terms* prior to a loss, and that the insured's reliance upon that misrepresentation actually causes the insured to incur damages."

FN26 The Court may consider the affidavit testimony submitted by Plaintiffs in support of their Motion to Remand so long as the testimony merely clarifies or amplifies claims actually alleged in the original petition and does not add new claims. FN27 Plaintiffs' Original Petition does allege that certain misrepresentations by Defendant Bading give rise to violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act. FN28 The affidavits submitted by Mr. and Mrs. Flanders serve to clarify the alleged misrepresentations that would be the basis of violating these statutes. Plaintiffs assert that Defendant Bading represented to them that John Alden and Fortis "were good companies ... had a solid reputation" and that they would be "getting quality affordable health insurance coverage with better options with a reputable company, John Alden." FN29 None of these statements rise to the level of being a representation about a "specific policy term," which is the prerequisite for an agent to incur individual liability. Accordingly, Plaintiffs have alleged no facts warranting liability under either the Texas Insurance Code or the Texas Deceptive Trade Practices Act.

FN25. *Id.* at 701 (citing Tex. Ins.Code Ann. article 21.21 § 16 (Vernon Supp.1999); Tex. Bus. & Com.Code Ann. § 17.50 (Vernon Supp.1999)).

FN26. *Id.* (emphasis added).

FN27. *Id.* at 700.

FN28. Pl. Original Petition at XXIV.

FN29. Pl. Motion to Remand (Docket No. 4), Ex. D, E.

***4** Plaintiffs' also argue that Defendants Bading and Comaltex breached a fiduciary duty of good faith and fair dealing. Plaintiffs first cite to an affidavit by Dan Corrigan, an insurance agent not related to this case, to support the proposition that an insurance agent owes a duty of good faith and fair dealing to his clients. While it is commendable that Mr. Corrigan believes that to be the proper standard of conduct, his affidavit does not make it the law. Plaintiffs then cite language from *Cateroa v. Brittish Alliance Assurance Ltd. of Nassau* FN30 which states that "a local agent ... owes his clients the greatest possible duty." FN31 However, the *Cateroa* court was referring to the agent's duty to inform his clients when their insurer becomes insolvent, not a general fiduciary duty. In fact, the Texas Supreme Court has held that "in an insurance context, the duty of good faith and fair dealing arises only when there is a contract giving rise to a 'special relationship.' ' FN32 The Court went on to state that "[a]n insurance carrier, not its agents and contractors providing claims handling services, is liable to the insured for actions by the agents or contractors that breach the duty of good faith and fair dealing owed by the carrier to the insured." FN33 Plaintiffs have not alleged that their relationship with Defendants Bading and Comaltex was governed by any contract, nor have they alleged any facts that would give rise to their having a "special relationship" with Bading and Comaltex. Therefore, Plaintiffs do not have a reasonable basis for recovery against these Defendants for breach of good faith and fair dealing.

FN30. 282 F.Supp. 167, 174 (S.D.Tex.1968).

FN31. *Id.*

FN32. *Natividad v. Alexsis, Inc.,* 875 S.W.2d 695, 698 (Tex.1994); *see also Cavallini v. State Farm Mutual Auto Ins. Co.,* 44 F.3d 256, 261 (5th Cir.1995).

FN33. *Id.* at 696.

***4** Although it is not exactly clear, it appears to the Court that Plaintiffs' negligence claim is that Defendants Bading and Comaltex were negligent in recommending John Alden as an insurance carrier. Plaintiffs argue this negligence is evidenced by Fortis's failure to properly pay benefits owed. Even construing the facts in the light most favorable to the Plaintiffs, the Court cannot find that there is a reasonable basis for recovery on this claim. Instead, Plaintiffs' allegations are more analogous to challenging Bading's professional judgment for recommending this policy. FN34 Under the Flanders' theory, if Defendants Bading and Comaltex were liable for negligence for failing to disclose either all prior incidents of Fortis being sued or that Fortis had in the past been accused of improperly denying benefits, then these Defendants would be liable to everyone to whom they had ever sold a John Alden/Fortis policy. Plaintiffs offer no evidence as to why Bading should have known to advise these particular customers of these facts. Plaintiffs simply assert in their affidavits that had they been told of the prior lawsuits, they would not have purchased this policy. However, "if a breach of due care can be proved without a more concrete showing than a subsequent failure of coverage, agents would be rendered "blanket insurers." FN35 Plaintiffs have failed to allege sufficient facts upon which they could recover for negligence in Texas.

FN34. *See May v. United Services Association of America,* 844 S.W.2d 666, 670 (Tex.1992).

FN35. *Id.* at 672.

*5 Finally, Plaintiffs allege a cause of action against these Defendants for conspiracy. In their Motion to Remand, Plaintiffs state that the "allegations in Paragraph XXI of Plaintiffs' Original Petition support a claim of conspiracy...." FN36 Paragraph XXI of Plaintiffs' Original Petition actually alleges violations of the Texas Insurance Code against Defendants John Alden and Fortis. FN37 Plaintiffs do assert a cause of action for conspiracy in Paragraph XXV of their Original Complaint; however, this paragraph merely states the common law definition of conspiracy and is not accompanied by any factual assertions in support of their claim. Therefore, Plaintiffs have not demonstrated a reasonable basis for recovery on the claim of civil conspiracy in Texas.

FN36. Pl. Motion to Remand (Docket No. 4) at p. 9.

FN37. Pl. Original Pet. at XXI.

CONCLUSION

*5 For the foregoing reasons, the Court finds that there is "no reasonable basis for predicting that the plaintiff might be able to recover against an in-state defendant." FN38 Consequently, joinder of Defendants Bading and Comaltex is improper. It is therefore ORDERED that Plaintiff's Motion to Remand (Docket No. 4) be DENIED.

FN38. *Smallwood,* 385 F.3d at 573.

W.D.Tex.,2005.
Flanders v. Fortis Ins. Co.
Not Reported in F.Supp.2d, 2005 WL 3068779 (W.D.Tex.)

Briefs and Other Related Documents (Back to top)

- 2006 WL 2306274 (Trial Motion, Memorandum and Affidavit) Defendants Time Insurance Company and John Alden Life Insurance Company's Motion for Summary Judgment (Jun. 28, 2006) Original Image of this Document (PDF)
- 2006 WL 2306273 (Trial Pleading) Plaintiffs' Second Amended Original Complaint (Jun. 8, 2006) Original Image of this Document (PDF)
- 2006 WL 1830420 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion to Compel Discovery from Defendants Time Insurance Company F/K/A Fortis Insurance Company and John Alden Life Insurance Company (May 5, 2006) Original Image of this Document (PDF)

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EXHIBIT 11

C

Briefs and Other Related Documents

Walker v. Philip Morris Inc.E.D.La.,2003.Only the Westlaw citation is currently available.

United States District Court,E.D. Louisiana.

Katherine Ann WALKER, et al

v.

PHILIP MORRIS INCORPORATED, et al

No. Civ.A. 02-2995.

Aug. 8, 2003.

ORDER AND REASONS

ENGELHARDT, J.

***1** Before the Court is plaintiffs' Motion to Remand. For the reasons that follow, the motion is DENIED.

I. *BACKGROUND*

***1** Peter Walker died of lung cancer on July 20, 2001. He had smoked Marlboro and Marlboro Light brand cigarettes from 1962 until he quit smoking in 1996. On July 19, 2002, his wife Katherine Anne Walker (on behalf of herself and her two minor children) filed this wrongful death and survival action in Louisiana state court. In addition to suing the maker of Marlboro cigarettes, Philip Morris USA Inc. (formerly known as Philip Morris Incorporated) and Philip Morris Companies (collectively, "Philip Morris"), plaintiffs also sued three local wholesale distributors of Philip Morris cigarettes: Quaglino Tobacco and Candy Co., Inc., J & R Vending Service, Inc., and George W. Groetsch, Inc. (the "distributor defendants"). Philip Morris removed the case to this Court on diversity grounds, asserting that the distributor defendants were fraudulently joined. Plaintiff promptly filed the instant Motion to Remand. The hearing initially was noticed for December 11, 2002, but was continued multiple times to accommodate discovery directed to the issues surrounding subject matter jurisdiction - twice at Philip Morris' request with plaintiffs' consent, and once at plaintiffs' request with defendants' consent. *See* Rec.Docs. 10, 12, 14, 17. The motion was heard at last on August 6, 2003, with oral argument.

II. *LAW AND ANALYSIS*

***1** Philip Morris argues that the Court should not consider the distributor defendants' citizenship in determining subject matter jurisdiction because: (1) the distributor defendants have lock-cinch affirmative defenses against plaintiffs' redhibition claim - namely, prescription under Louisiana's redhibition law and preemption under the Federal Cigarette Labeling and Advertising Act; and (2) plaintiffs have no viable cause of action against the distributor defendants under any other theory, whether in tort, express warranty, or under the Louisiana Products Liability Act ("LPLA").

A. *The Standard and Procedure for Determining Fraudulent Joinder in the Fifth Circuit:*

***1** To establish that the distributor defendants were fraudulently joined, defendants bear the heavy burden of showing either that there is outright fraud in plaintiffs' allegations or that " 'there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court." ' *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746, 751 (5th 1996) (quoting *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir.1995)). "In reviewing a claim of fraudulent joinder, the district court must evaluate all factual allegations and ambiguities in the controlling state law in favor of the plaintiff." *Id.* at 751. However, the Court is not bound to accept the petition's allegations in the face of countervailing evidence. To the contrary, even if the petition facially states a claim against an in-state defendant, the Court may pierce the pleadings to examine affidavits and other summary judgment-type evidence. *Id.* In such a case, removal jurisdiction is established if, in light of the evidence presented, construing all disputed questions of fact and ambiguities in state law in plaintiffs' favor, the Court finds that "there is no reasonable basis for predicting that plaintiffs might establish liability in their ... claim against the in-state defendants." *Badon v. R J R Nabisco Inc.*, 224 F.3d 382, 393 (5th Cir., 2000) (*Badon I*).

*2 The Fifth Circuit not only has sanctioned use of this summary judgment-like procedure, it has urged it. *See* Sid Richardson, 99 F.3d at 751 ("We have consistently held that claims of fraudulent joinder *should* be resolved by a summary judgment-like procedure whenever possible.") (emphasis added); *Badon I*, 224 F.3d at 393 ("our precedent establishes that 'a removing party's claim of fraudulent joinder to destroy diversity is viewed as similar to a motion for summary judgment." ') (quoting *LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir.1992)). "While such a procedure requires that 'all *disputed* questions of fact' be 'resolved in favor of the nonremoving party,' 'in determining diversity the mere assertion of "metaphysical doubt as to the material facts" is insufficient to create an issue if there is no basis for those facts ." ' *Badon I*, 224 F.3d at 393 (emphasis in original) (quoting *Carriers v. Sears, Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990), and *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 816 (5th Cir.1993)). The Court must " 'resolve factual controversies in favor of the [plaintiff], but *only* when there is an actual controversy, that is, when *both* parties have submitted *evidence* of contradictory facts." ' *Badon I*, 224 F.3d at 393-94 (emphasis in original) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc)).

B. *Plaintiffs' Redhibition Claims:*

*2 Philip Morris concedes, as it must, that plaintiffs may be able to state a redhibition cause of action against the distributor defendants under Louisiana law as it stands today. *See* *Badon v. R J R Nabisco Inc.*, 236 F.3d 282, 286 (5th Cir., 2000) (*Badon II*) ("there is arguably a reasonable basis for predicting that plaintiffs might establish redhibition ... liability against the Louisiana [cigarette] wholesalers under Louisiana law as it stands today"). However, the analysis does not end here. As the Fifth Circuit explained in *Sid Richardson, supra*, the analysis extends to affirmative defenses that would operate to preclude the possibility of recovery against the non-diverse defendants. *Sid Richardson*, 99 F.3d at 753. If there is "absolutely no possibility" that plaintiffs might overcome the affirmative defenses, then the joinder was fraudulent and removal jurisdiction is proper. *Id.* at 743, 746. On the other hand, "if there is any possibility that [plaintiffs] might survive the affirmative defenses," then the case must be remanded to state court. *Id.*

*2 Philip Morris argues that plaintiffs' redhibition claims are prescribed under the undisputed facts of this case. The most lenient prescriptive period for redhibition claims for purchases made before January 1, 1995 is one year from the date of discovery of the defect. *See* *Potts v. R.J.R. Reynolds Tobacco Co.*, 2001 WL 1230650 *1 (E.D. La.2001); *see also* *Scott v. R.J. Reynolds Tobacco Co.*, 2001 WL 797992 (E.D.La.2001) (analyzing former Civil Code articles 2534 and 2546). With regard to purchases made after January 1, 1995, the prescriptive period for redhibition claims against a seller "who did not know of the existence of a defect" is four years from the date of sale or one year from the date of discovery of the defect, whichever occurs first. *See* La. Civ.Code art. 2534(A). For sellers who knew or are presumed to have known of the defect, the prescriptive period is one year from the date of discovery of the defect, without regard to the date of sale. *See* La. Civ.Code art. 2534(B).

*3 Where a smoker or ex-smoker had knowledge more than one year prior to filing suit that cigarettes are addictive and harmful to health, that person's redhibition claim is prescribed. *See* *Potts*, 2001 WL 1230650 (Beer, J.) (redhibition claims against local cigarette distributors were prescribed and therefore fraudulently joined); *Scott*, 2001 WL 797992 (Clement, J.); *cf.* *Lanzas v. The American Tobacco Co., Inc.*, 2001 WL 474281 (E.D.La.2001) (Vance, J.)

*3 Here, plaintiffs allege that the cigarettes were defective because they were addictive in nature and had harmful health effects. Philip Morris has introduced Ms. Walker's deposition transcript, in which she testifies that her husband quit smoking for good in late 1996. *See* Walker Depo. at pp. 32-45, 55-56. Thus, his last date of purchase would have been some time during that year. She also testifies that her husband made statements prior to quitting, in which he referred to himself as "addicted" to cigarettes and stated that he could not quit smoking because he was addicted. *Id.* at pp. 49-51. Plaintiff believes her husband quit smoking because he had an understanding that smoking was bad for his health. *Id.* at p. 30. He had supported her in quitting smoking in 1993 and stopped smoking inside their home while she was pregnant in 1994. *Id.* at pp. 25-28, 53-55. He was diagnosed with lung cancer in July 1999.

***3** Plaintiffs have introduced no evidence to dispute these facts. Nor have they proffered any arguments tending to refute Philip Morris' analysis showing that Peter Walker bought his last cigarette more than four years before suit was filed and knew of the defects complained of more than one year before suit was filed. Indeed, at oral argument, plaintiffs' counsel conceded the weakness of his redhibition claim in light of the prescription defense. Under these circumstances, the Court is unable to find any possibility that plaintiffs might survive the defense of prescription. Accordingly, the Court finds that the redhibition claims against the distributor defendants were fraudulent. Consequently, the Court need not address the defense of preemption.

C. *Express Warranty:*

***3** Although plaintiffs assert a conclusory allegation in their petition regarding an express warranty, they have presented no facts or arguments regarding an express warranty by the distributor defendants. Indeed, at oral argument, in response to questioning from the Court, plaintiffs' counsel was unable to describe or point to any express warranty made by the distributor defendants. Given that each of the distributor defendants has attested in a sworn affidavit that it has never made any representations or warranties concerning cigarettes, and considering that plaintiffs have proffered no evidence to dispute this fact, the Court can find no reasonable basis for predicting that plaintiffs might establish liability against the distributor defendants based on any express warranty theory.

D. *Louisiana Products Liability Act ("LPLA"):*

***4** Nor have plaintiffs presented any facts or arguments supporting liability under the LPLA. Liability under the LPLA is limited to "manufacturers." *See* La.Rev.Stat. § 2800.54 (imposing liability only on the "manufacturer" of a product that is unreasonably dangerous). Each of the distributor defendants has attested in a sworn affidavit that it has never engaged in designing, manufacturing, packaging, or labeling cigarettes; has never labeled, packaged, or advertised cigarettes as its own product, or otherwise held itself out as the manufacturer of cigarettes; does not incorporate any cigarettes it purchases into any other product; has never exercised any influence over any characteristic of the design, composition, construction, or quality of cigarettes; and is an independent company that is not controlled by any cigarette manufacturer. Plaintiffs have presented no evidence to dispute these facts. Accordingly, the Court finds that there is no reasonable basis for predicting that plaintiffs might establish liability against any of the distributor defendants as a "manufacturer" of cigarettes under the LPLA. *See* La.Rev.Stat. § 2800.53 (defining the term "manufacturer" as used in the LPLA).

E. *Tort Claims:*

***4** Plaintiffs' primary arguments in opposition to Philip Morris' assertion of fraudulent joinder are grounded in tort. They are: (1) that in distributing and promoting Marlboro and Marlboro Light brand cigarettes, the distributor defendants acted as agents of Philip Morris in carrying out Philip Morris' alleged scheme of fraudulently concealing information regarding the addictiveness and health effects of cigarettes, particularly "light" cigarettes, and therefore that the distributor defendants are liable for any damages caused by this alleged fraudulent concealment; and (2) that the distributor defendants are liable as sellers of a defective product under Louisiana tort law, as articulated in Ard v. Kraft, Inc., 540 So.2d 1172 (La.App. 1st Cir.1989), because they knew or should have known that the cigarettes they sold were defective.

1. *Agency:*

***4** Plaintiffs' agency argument is flawed in two respects. First, plaintiffs' petition contains no allegations that even suggest an agency relationship between Philip Morris and any distributor defendant, much less hint at a claim of liability based on an agency theory. This failure alone dooms the agency theory as a basis for overcoming the claim of fraudulent joinder, for removal jurisdiction must be determined "on the basis of claims in the state court complaint as it exists at the time of removal." *See* Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 264 (5th Cir.1995).

***4** Second, even if the claim of agency had been alleged in the petition, it nevertheless fails because, based on the record, there exists no reasonable basis for predicting that plaintiffs might succeed in establishing liability based on the theory. Each of the distributor defendants has attested in a sworn affidavit that it is not an agent of Philip Morris (or any other tobacco manufacturer) and is not controlled by any cigarette manufacturer. Plaintiffs have presented no evidence to dispute these facts. Under the summary judgment-type procedure endorsed in *Sid Richardson* and *Badon I, supra,* this failure is disastrous to plaintiffs' remand attempt.

***5** At oral argument, the Court explicitly asked plaintiffs' counsel if he was requesting additional time to conduct any discovery needed to dispute the defendants' evidence. He assured the Court that he was not seeking to conduct additional discovery at this time. Instead, counsel repeatedly asserted that he is not required to produce contradictory evidence under *Sid Richardson* and *Badon I.* The Court disagrees. *Badon I* made clear what previous Fifth Circuit decisions had suggested: even though a plaintiff's petition may allege a cause of action against an in-state defendant, such a claim will not survive a fraudulent joinder challenge if the defendants produce evidence showing that there is no reasonable possibility of plaintiff's recovering on that claim and the plaintiff fails to proffer any countervailing evidence in response. Badon I, 224 F.3d at 392-94. In *Badon,* the Fifth Circuit found the plaintiffs' tort claim against the local cigarette distributors to be fraudulent despite the fact that the plaintiffs in that case had alleged a conspiracy cause of action against the distributors - a cause of action that theoretically would have been viable under Louisiana law. There, as here, affidavits of the distributors negated the plaintiffs' allegations. *Id.* at 393. And, there, as here, the plaintiffs never tendered any summary judgment type evidence either to refute the affidavits or to support their own allegations. "[I]n light of the plaintiffs' lack of evidence," the Fifth Circuit found that there was no reasonable basis for predicting that the plaintiffs might succeed in their conspiracy claim. The court emphasized that in determining fraudulent joinder, a court " 'resolve[s] factual controversies in favor of the [plaintiff], but *only* when there is an actual controversy, that is, when *both* parties have submitted *evidence* of contradictory facts." *Id.* at 393-94 (emphasis in original) (quoting Liquid Air, 37 F.3d at 1075).

***5** Thus, in light of *Badon I,* the plaintiffs were required to present evidence in response to the distributors' affidavits refuting the existence of any agency relationship. Given plaintiffs' failure to do so, the Court finds plaintiffs' agency claim (to the extent one has been alleged) to be fraudulent.

2. Ard v. Kraft:

***5** Plaintiffs' claim under *Ard v. Kraft* falls for the same reason. Under Louisiana law, a distributor or retailer who did not manufacture, design, or alter prior to sale a defective product is not liable in tort for damages resulting from the product absent a showing that he knew or should have known that the product was defective. Ard v. Kraft, Inc., 540 So.2d 1172, 1177 (La.App. 1st Cir.1989) ("A grocery store owner who did not manufacture a defective product is not responsible for injury and damages resulting from such product in the absence of a showing that he knew or should have known that the product was defective."); *see also* Wilson v. State Farm Fire and Caves. Ins. Co., 654 So.2d 385, 387(La.App. 3d Cir.) ("The non-manufacturing seller of a defective product is not responsible for damages in tort absent a showing that he knew or should have known the product was defective and failed to declare it."), *writ denied,* 661 So.2d 476 (La.1995). Other sections of this Court have held that wholesale cigarette distributors cannot be held liable under this theory where they have no knowledge regarding the nature of the cigarettes beyond that generally known to the community. *See* Barrett v. R.J. Reynolds Tobacco Co., 1999 WL 460778 *2 (E.D. La. June 29, 1999) (Sear, J.) (Where plaintiff had introduced no evidence to contradict Quaglino's affidavit attesting that the only knowledge that Quaglino possessed regarding the nature of Salem cigarettes was that generally known to the community, Court found that there was no possibility the plaintiffs would be able to establish a cause of action against Quaglino under *Ard*.); *Jackson v. Brown & Williamson Tobacco Corp.,* 2003 WL 548920 *1 (E.D.La.2003) (Fallon, J.) ("This Court agrees with the holding of *Barrett* and finds that the plaintiffs have failed to state a cause of action against Quaglino."). This Court agrees with Judge Fallon and Judge Sear in this regard.[FN1]

FN1. At oral argument, plaintiffs' counsel argued against such a holding. According to plaintiffs' counsel, if the smoker himself necessarily must have known of the defects (as shown by the defendants' evidence on the issue of prescription), then the distributors likewise must have known. However, plaintiffs have failed to point this Court to any authority suggesting that a Louisiana court might impose liability on a non-manufacturer seller whose knowledge of the defect was the precisely the same as that of the buyer.

*6 Each of the distributor defendants has attested in a sworn affidavit that it has never received information concerning the health risks associated with smoking, nicotine addition, nicotine levels in cigarettes, or the manipulation of nicotine levels, aside from that generally available to smokers and the public at large, and that it has not had any specialized knowledge concerning these matters that was not available to the general public. Plaintiffs have proffered no evidence to dispute these facts. Given this failure, in light of *Badon I,* discussed *supra,* the Court is unable to find any basis for predicting that Louisiana law might impose liability under *Ard* against any of the distributor defendants.

III. *CONCLUSION*

*6 Accordingly, for these reasons, IT IS ORDERED that plaintiffs' Motion to Remand is DENIED.

E.D.La.,2003.

Walker v. Philip Morris Inc.
Not Reported in F.Supp.2d, 2003 WL 21914056 (E.D.La.)

Briefs and Other Related Documents (Back to top)

• 2002 WL 32153582 (Trial Motion, Memorandum and Affidavit) Motion to Remand (Nov. 01, 2002)
• 2:02CV02995 (Docket) (Oct. 02, 2002)

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Steve Weinberg, Plaintiff, vs. National Football League Players Association, Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Roger Kaplan, John Collins, Keith Washington, Tony Agnone, Howard Shatsky, and Mark Levin, Defendants.	§ § § § § § § § § § § § § §	Civil Action No. 3-06-CV2332-B **ECF**

DECLARATION OF KEITH WASHINGTON

KEITH WASHINGTON hereby declares, under penalty of perjury, as follows:

1. I am a former professional football player and former member of the National Football League Players Association ("NFLPA"). I submit this Declaration, of my own personal knowledge, in opposition to the plaintiff's motion to remand.

2. I have reviewed the allegations of conspiracy in the plaintiff's petition. To the extent the allegations are in any way directed against me, they are unfounded. I have never met with, discussed, or otherwise planned with any of the defendants in this action to take any of the unlawful acts alleged in the petition.

3. I understand that in the plaintiff's petition, he has accused me of participating in a conspiracy "to revoke Weinberg's certification as an NFLPA Contract Advisor." (Petition, ¶ 38). The allegation that I was a member of an "evil cabal " to ruin the plaintiff's life (Petition, ¶ Introduction) is, frankly, absurd. At no time have I entered

into any agreement with anyone, including any defendant in this matter, to conspire against Steve Weinberg to revoke his certification as an NFLPA Contract Advisor, or for any other improper purpose. At no time did I commit any act in furtherance of any conspiracy against Weinberg with the purpose to revoke his certification as an NFLPA Contract Advisor, or for any other improper purpose.

4. I have reviewed the allegations made in paragraph 67 of the plaintiff's petition. I submitted a letter to the NFLPA on January 7, 2004. I drafted the letter without the help or direction of anyone, including any defendant in this matter. The contrary allegations that Weinberg makes in paragraph 67 of his petition are false.

5. All the remaining allegations in the plaintiff's petition, to the extent they are directed against me, are frivolous. I have not committed any of the other improper acts that the plaintiff alleges in his petition.

6. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on February 27, 2007.

Keith Washington

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Steve Weinberg, Plaintiff, vs. National Football League Players Association, Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Roger Kaplan, John Collins, Keith Washington, Tony Agnone, Howard Shatsky, and Mark Levin, Defendants.	§ § § § § § § § § § § § § §	Civil Action No. 3-06-CV2332-B **ECF**

DECLARATION OF JOHN COLLINS

JOHN COLLINS hereby declares, under penalty of perjury, as follows:

1. I am an attorney and member of the State Bar of Texas. I submit this Declaration, of my own personal knowledge, in opposition to the plaintiff's motion to remand

2. I have reviewed the allegations of conspiracy in the plaintiff's petition To the extent the allegations are in any way directed against me, they are unfounded. I have never met with, discussed, or otherwise planned with any of the defendants in this action to take any of the unlawful acts alleged in the petition.

3. I understand that in the plaintiff's petition, he has accused me of participating in a conspiracy "to revoke Weinberg's certification as an NFLPA Contract Advisor." (Petition, ¶ 38). The allegation that I was a member of an "evil cabal " to ruin the plaintiff's life (Petition, ¶ Introduction) is absolutely false. At no time have I entered into any agreement with anyone, including any defendant in this matter, to conspire

against Steve Weinberg to revoke his certification as an NFLPA Contract Advisor, or for any other improper purpose. At no time did I commit any act in furtherance of any conspiracy against Weinberg with the purpose to revoke his certification as an NFLPA Contract Advisor, or for any other improper purpose.

4. I have reviewed the allegations made in paragraph 71 of the plaintiff's petition. As counsel to various NFL players sued by Weinberg's former partner Howard Silber, I drafted an escrow agreement in 2002 in connection with garnishment proceedings commenced by Silber in Texas. I did not, however, draft the escrow agreement in furtherance of any conspiracy to revoke Weinberg's certification as an NFLPA Contract Advisor, or for any other improper purpose. The contrary allegations that the plaintiff makes in paragraph 71 of the petition are false.

5. I have reviewed the allegations made in paragraphs 82 and 83 of the plaintiff's petition. The allegation that I gave false testimony in connection with Weinberg's appeal of his three year decertification is frivolous. The testimony I gave in that proceeding was true. Further, I did not testify in connection with Weinberg's appeal of his decertification in furtherance of any conspiracy to improperly revoke his certification as an NFLPA Contract Advisor, or for any other unlawful purpose.

6. I have reviewed the allegations made in paragraph 84 of the plaintiff's petition. The allegation that I improperly withheld and refused to release to Weinberg money collected under the escrow agreement is false. Further, I have never withheld any money from Weinberg in furtherance of any conspiracy to revoke his certification as an NFLPA Contract Advisor, or for any other improper purpose.

7. All the remaining allegations in the plaintiff's petition, to the extent they are directed against me, are frivolous. I have not committed any of the other improper acts that the plaintiff alleges in his petition.

8. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on February 26, 2007.

John E. Collins

John Collins